2. Municipal Corporations (§ 803*)—Defective Streets—Injuries to Pedestrians.—A pedestrian, injured by a defective sidewalk, must show that he used reasonable care to avoid the accident.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1672; Dec. Dig. § 803.* 12 Va.-W. Va. Enc. Dig. 916.]

3. Municipal Corporations (§ 805*)—Defective Streets—Injuries to Pedestrians—Liability.—One using a street or sidewalk in the ordinary way may, in the absence of knowledge to the contrary, act on the assumption that the same is in a reasonably safe condition; but where he has notice of defects, and is not using the street or sidewalk in the ordinary manner, he must exercise prudence in proportion to the danger from the known defect and the different use to which he is putting it.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1677; Dec. Dig. § 805.* 12 Va.-W. Va. Enc. Dig. 917-919.]

4. Municipal Corporations (§ 805*)—Defective Sidewalks—Injuries to Traveler—Contributory Negligence.—A traveler was injured by stepping from a carriage to the sidewalk by the end of the board giving way and the other end flying up. The sidewalk was constructed of boards laid on stringers about two feet above the level of the street. She knew that many boards were loose, and would tilt if stepped on outside of the stringer. She stepped on the walk without exercising any care either in seeing that the board on which she stepped was fastened to the stringers or by stepping on it inside of the stringers. Held, that she was guilty of contributory negligence as a matter of law.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1677; Dec. Dig. § 805.* 12 Va.-W. Va. Enc. Dig. 917.]

Judgment reversed. All the judges concur.

PERCY et al. *v.* FIRST NAT. BANK OF LOUISA, KY., et al.

Sept. 9, 1909.

[65 E. E. 475.]

1. Evidence (§ 441*)—Parol Evidence Varying Terms of Written Instrument.—Evidence of a cotemporaneous parol agreement is not admissible to vary or contradict the terms of a valid instrument, except in cases of fraud or mistake.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2030; Dec. Dig. §441.* 10 Va.-W. Va. Enc. Dig. 646.]

2. Reformation of Instruments (§ 43*)—Presumptions—Burden of Proof.—While equity has jurisdiction to reform written instruments for mutual mistake, the presumption is that the writing speaks the

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*For other cases see same topic and section NUMBER in Dec. and Am. Digs. 1907 to date, and Reporter Indexes.

final agreement of the parties, and the burden is on complainant to overcome this presumption by the clearest and most satisfactory proof.

[Ed. Note. For other cases, see Reformation of Instruments, Cent. Dig. § 154; Dec. Dig. § 43.* 11 Va.-W. Va. Enc. Dig. 905.]

3. Assignments for Benefit of Creditors (§ 297*)—Rights of Creditors—Waiver.—Nonresident creditors of an assignor for the benefit of creditors did not waive their rights to distribution under the assignment, where they did not know that their claims were secured by the assignment until immediately prior to filing their demand for participation.

[Ed. Note.—For other cases, see Assignments for Benefit of Creditors, Cent. Dig. § 871; Dec. Dig. § 297.* 1 Va.-W. Va. Enc. Dig. 838; 13 id. 637.

Judgment affirmed. Cardwell, J., absent.

STRICKLAND *v.* FAIRFAX.

Sept. 9, 1909.

[65 S. E. 477.]

Brokers (§ 39*)—Right to Commissions.—Where a broker performed services towards leasing property, but before he had leased it he told the owner he would charge him nothing for his services, he was entitled to no compensation, either for the subsequent or the prior services, whether the prior services were rendered without a contract therefor, or under a contract to effect a lease, in which latter case no commission would be earned till the lease was effected.

[Ed. Note.—For other cases, see Brokers, Dec. Dig. § 39.* 2 Va.-W. Va. Enc. Dig. 638, et seq.]

Judgment reversed and remanded for new trial. Keith, P., absent.

VIRGINIA IRON, COAL & COKE CO. *v.* MUNSEY.

Sept. 9, 1909.

[65 S. E. 478.]

1. Appeal and Error (§ 1061*)—Harmless Error—Denial of Amendments.—Refusal to allow an amendment to the grounds of demurrer to the evidence by adding another ground was not prejudicial to defendant, where it had a right to and did make the other ground under the grounds of demurrer filed.

[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. § 1061.* 1 Va.-W. Va. Enc. Dig. 587, et seq.]

2. Trial (§ 139*)—Demurrer to Evidence.—If, under the evidence,

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*For other cases see same topic and section NUMBER in Dec. and Am. Digs. 1907 to date, and Reporter Indexes.